FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK

EVERETT A. MARTIN, JR.
JUDGE

100 ST. PAUL'S BOULEVARD
NORFOLK, VIRGINIA 23510

May 23, 2012

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Re: Norfolk Community Services Board v. Jill D. McGlone, *et al.*
Civil No.: CL11-2968

Dear Gentlemen:

This action now comes on Pratt's demurrer (which included a brief) and supplemental brief to Count Five of the amended complaint, alleging breach of contract. The CSB produced Pratt's employment contracts on March 1 in response to the Court's order of February 15. Pratt raises four grounds. First, the remedy the contract provides, termination, is exclusive. Second, the damages claimed were not a result of the breach alleged. Third, the breach was concealed from him. Fourth, the contract is too vague to establish a standard to judge his actions. The CSB filed no brief.

I overrule the third ground as I believe it to be a question of fact.

Pratt's Duties

By the common law, an employee is to use ordinary and reasonable skill, care, diligence, and attention in the discharge of the duties of his position unless an express contract imposes a higher degree of skill, *etc. Hatton v. Mountford*, 105 Va. 96, 103, 52 S.E. 847, 849 (1906). Pratt's annual contracts did not require much, if anything, more. He was to accomplish his duties "professionally and in a manner consistent with the performance expectations established by the [CSB]." Paragraph 2. Examples of his extensive duties and "performance requirements" were attached to his 2005-2006 contract as Exhibit A. His other contracts seem to be identical except for the change of fiscal year and the probably inadvertent omission of Exhibit A.

The duties and performance requirements of Exhibit A that Pratt had as they related to McGlone's employment were:

> SUPERVISION EXERCISED: Is the appointing and removing authority for Services Board staff ...
>
> 7. Is accountable to the Board for providing fiscal, budgetary, and programmatic oversight through a system of reports regularly submitted by Board-operated and contractual programs.
>
> 8. Directs the overall development and administration of the budgets for Board operated programs ...
>
> 13. Serves as the chief personnel officer of the Board ...
>
> 15. Directly supervises the Board's administrative/management staff.
>
> PERFORMANCE REQUIREMENTS:
>
> Skills in public administration and management skills such as...budgeting...; ability to manage CSB program operations on a day-to-day basis utilizing independent initiative and judgement;...

When Pratt's duty as "chief personnel officer" and "removing authority" is considered in light of the common law, he certainly had a duty to pay only employees who worked. I overrule the fourth ground of the demurrer.

Exclusivity of Remedy

The contract provided for Pratt's involuntary termination in paragraph 10 (b). It gave him a right to a hearing before the board. It also provided he would be paid for accrued annual leave. Pratt was not involuntarily terminated, but retired. Thus paragraph 10 (b) does not even apply. Pratt nonetheless claims this is the CSB's only remedy. The contract was otherwise silent on remedies or damages.

A party may claim common law damages for a breach of contract unless the contractual remedy is clearly stated to be exclusive. *Bender-Miller Co. v. Thornwood Farms, Inc.*, 211 Va. 585, 179 S.E.2d 636 (1971). I overrule the first ground of the demurrer.

Damages Resulting from the Breach

The CSB claimed what it paid McGlone from 1998 through 2010 as damages from Pratt. By the order of February 15, I barred the CSB's claim for any breaches of contract occurring before April 12, 2006.

There are two categories of contract damages: direct and consequential. Direct damages are those that arise naturally or ordinarily from a breach of contract; they are damages that in the ordinary course of human experience can be expected to result from a breach. *Roanoke Hospital v. Doyle and Russell*, 215 Va. 796, 801, 214 S.E.2d 155, 160 (1975)[1]. In the ordinary course of human experience employees are not paid for twelve years for not working. The damages claimed are not direct.

Consequential damages arise from the intervention of special circumstances not ordinarily predictable. Such damages are compensable only if it is determined the special circumstances were within the contemplation of both parties when the contract was executed. "Contemplation includes what was actually *foreseen* and what was reasonably *foreseeable*. *Roanoke Hospital*, supra, n. 4. (emphasis added). In most of its decisions, our Supreme Court has held that whether special circumstances were within the contemplation of the parties is a question of fact. *Roanoke Hospital, supra*; *V.P.I. v. Interactive Return Service, Inc.*, 267 Va. 642, 654, 595 S.E.2d 1, 7 (2004); *R.K. Chevrolet, Inc. v. Hayden*, 253 Va. 50, 56, 480 S.E.2d 477, 481 (1997). In one case the Court has held it is "generally" a question of fact. *Fairfax County R&H Authority v. Hurst & Assoc.*, 231 Va. 164, 167, 343 S.E.2d 294, 296 (1986). Professor Corbin holds it is a question of fact "subject to the usual supervisory power of the court." 11 Corbin, *On Contracts* §56.7 (2005).

Consequential damages are based on future events not known at the time of the execution of the contract. They arise from "circumstances not ordinarily predictable;" the circumstances allowing such damages are "actually *foreseen*" or "reasonably *foreseeable*." The payments to McGlone that are complained of began more than *seven years before* Pratt signed the first contract at issue. It is difficult to believe Pratt contemplated making himself financially liable for damages that already existed and continued to accrue when he signed the contracts.

[1] Virginia's law of direct and consequential damages has it origin in *Hadley v. Baxendale*, 9 Ex. 341, 354-55, 156 Eng. Rep. 145, 151 (1854). Even though our Supreme Court has stated in *dictum*, that our adoption of the English common law ends in 1607, *Commonwealth v. Morris*, 281 Va. 70, 705 S.E.2d 503 (2011), I assume the law of direct and consequential damages *ex contractu* remains unchanged.

The general American rule holds that an employer's damages for an employee's breach of a contract of employment are the excess cost of a replacement employee. Although the "courts generally recognize the possibility of an award of consequential damages against the breaching employee, the rules of foreseeability, mitigation and certainty have been so strictly applied as to indicate a strong policy against such awards against employees." 11 Corbin, *supra*, at §60.8. However, Corbin noted in the same section that that Virginia law does allow an employer to recover lost profits from a breaching employee, citing *R.K. Chevrolet, supra.* It might be thought that the squandering of public monies by a public agency is akin to the lost profits of a private enterprise. The contract in *R.K. Chevrolet* was as bare-bones as Pratt's contracts, and the Supreme Court there approved the recovery of lost profits.

Employment contracts in Virginia are largely governed by the common law. Custom is the foundation of the common law, and the decisions of the courts are its monuments. 1 Blackstone, *Commentaries on the Laws of England*, pp. 63-64, 67 (1765). Although some might wish it otherwise, it is certainly not the custom in Virginia for a public employee to be held liable *ex contractu* for the mismanagement of his agency.[2] The CSB's failure to cite any authority from any Virginia court holding a public employee so liable establishes the lack of any such custom.

In recent years, some companies, especially financial companies, have begun to insert so-called "clawback" provisions in the employment contracts of highly paid employees. These provisions allow the employer to recoup part of the employee's or former employee's compensation if he causes the employer damages that arise or are discovered after the employee has been compensated or after his employment has ended. There is no such provision in Pratt's contracts. If Virginia municipalities wish to make the heads of agencies personally liable for financial mismanagement they should expressly so provide by contract (and expect to pay higher salaries and find fewer people willing to take the positions).

I sustain the second ground of Pratt's demurrer to Count Five without leave to amend. I attach an order.

Sincerely yours,

Everett A. Martin, Jr.
Judge

EAMjr/mls

[2] There are statutory bonding requirements for local officers and employees. *Code of Virginia* §§2.2-1840(B), 15.2-1527 *et seq.* This is not an action on a bond.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

NORFOLK COMMUNITY SERVICES BOARD,

Plaintiff,

v.

Civil No. CL11-2968

JILL D. McGLONE, *et al.*,

Defendants.

ORDER

For the reasons stated in the Court's letter of May 23, 2012, George W. Pratt's demurrer to Court 5 of the Amended Complaint is SUSTAINED and this claim is DISMISSED without leave to amend.

The style of the case is changed to *Norfolk Community Services Board v. Jill D. McGlone*, and all future filings shall be so designated.

Endorsements are waived pursuant to Rule 1:13.

ENTER: May 23, 2012

Judge

Everett A. Martin Jr., Judge